

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RUDOLPH SERRANO,

Plaintiff,

v.

No. 16cv332 MV/KK

LEMUEL L. MARTINEZ, and
FNU BUHL,

Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO PROCEED IN FORMA PAUPERIS

THIS MATTER comes before the Court on *pro se* Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 5, filed April 22, 2016 ("Application") and on Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed April 22, 2016 ("Complaint"). For the reasons stated below, the Court will **GRANT** Plaintiff's Application and **DISMISS** Plaintiff's Complaint **without prejudice**. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Applications to Proceed *in forma pauperis*

The statute for proceedings *in forma pauperis*, 28 U.S.C. § 1915(a), provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

When a district court receives an application for leave to proceed in forma pauperis, it should examine the papers and determine if the requirements of [28 U.S.C.] § 1915(a) are satisfied. If they are, leave should be granted. Thereafter, if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.]

Menefee v. Werholtz, 368 F. App'x 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962)). “[A]n application to proceed *in forma pauperis* should be evaluated in light of the applicant's present financial status.” *Scherer v. Kansas*, 263 F. App'x 667, 669 (10th Cir. 2008) (citing *Holmes v. Hardy*, 852 F.2d 151, 153 (5th Cir.1988)). “The statute [allowing a litigant to proceed *in forma pauperis*] was intended for the benefit of those too poor to pay or give security for costs....” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 344 (1948). While a litigant need not be “absolutely destitute,” “an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life.” *Id.* at 339.

The Court will grant Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs. Plaintiff states that: (i) his monthly income is \$800.00 from retirement; (ii) his monthly expenses are \$800.00; (iii) he owns no assets; (iv) he has no cash and no money in bank accounts; and (v) he is unemployed. The Court finds that Plaintiff is unable to prepay the fees to initiate this action because his monthly expenses are equal to his monthly income, and because he is unemployed.

Dismissal of Proceedings In Forma Pauperis

The statute governing proceedings *in forma pauperis* requires federal courts to dismiss an *in forma pauperis* proceeding that “is frivolous or malicious; ... fails to state a claim on which relief may be granted; ... or seeks monetary relief against a defendant who is immune from such relief.” *See* 28 U.S.C. § 1915(e)(2). “Dismissal of a *pro se* complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend.” *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th

Cir. 2007). “In determining whether a dismissal is proper, we must accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff.” *Id.* The Court looks to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief, i.e. the factual allegations must be enough to raise a right to relief above the speculative level. *See id.* at 1218 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Dismissal of an *in forma pauperis* complaint as frivolous is not an abuse of discretion based on a determination that the *pro se* litigant did not state a viable legal claim and that the complaint consisted of little more than unintelligible ramblings. *Triplett v. Triplett*, 166 F. App’x 338, 339-340 (10th Cir. 2006). However, “*pro se* litigants are to be given reasonable opportunity to remedy the defects in their pleadings.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991).

Plaintiff’s Complaint is difficult to understand. Plaintiff indicates that Defendant Rio Rancho Police Officer Buhl “[met] and confer[red] maliciously [sic] with” Defendant District Attorney Lemuel Martinez, that the “Rio Rancho Police Dept. and D.A. Office continue to detriment my health from a deadly illness by kiddnaping [sic] me with legal ‘Evils of delay’ in from past since they have nothing present,” and refers to retaliation. Complaint at 1-2, 4. Documents attached to the Complaint indicate that Plaintiff is the target of a grand jury investigation in the County of Sandoval and that the case will be presented to the grand jury on April 28, 2016. *See* Complaint at 12. However, Plaintiff’s factual allegations do not clearly indicate what specific actions Defendants Martinez and Buhl took or how those actions constitute a deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States. Plaintiff states that he has begun another lawsuit dealing with the same facts in this

action which is still pending. *See* Complaint at 3. That other lawsuit was dismissed without prejudice for failure to comply with Court orders and rules on the same day that Plaintiff filed his Complaint in this case. *See Serrano v. Martinez*, Doc. 11, filed April 22, 2016, 15cv1063 KG/KK (D.N.M.).

The Court will dismiss Plaintiff's Complaint for failure to state a claim. Plaintiff fails to state with any particularity what each Defendant did to Plaintiff, when the Defendants committed these alleged unspecified actions, or how those actions harmed Plaintiff. *See Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center*, 492 F.3d 1158, 1163 (10th Cir. 2007) (“[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant’s action harmed him or her; and, what specific legal right the plaintiff believes the defendant violated.”). Furthermore, if Plaintiff's Complaint is based on the grand jury proceedings, it appears that District Attorney Martinez may be immune from suit. *See Mink v. Suthers*, 482 F.3d 1244, 1261 (10th Cir. 2007) (“a prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government’s case”).

Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Service on Defendants

Section 1915 provides that the “officers of the court shall issue and serve all process, and perform all duties in [proceedings *in forma pauperis*]”). 28 U.S.C. § 1915(d). Rule 4 provides that:

At the plaintiff’s request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court.

The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

Fed. R. Civ. P. 4(c)(3).

The Court will not order service of Summons and Complaint on Defendants at this time because the Court is dismissing Plaintiff's Complaint. The Court will order service if Plaintiff timely files an amended complaint which states a claim on which relief may be granted and includes the addresses of every defendant named in the amended complaint.

IT IS ORDERED that Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 5, filed April 22, 2016, is **GRANTED**.

IT IS ALSO ORDERED that Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed April 22, 2016, is **DISMISSED without prejudice**. Plaintiff may file an amended complaint within 21 days of entry of this Order.



UNITED STATES DISTRICT JUDGE